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No. 91-1123

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES F. RIVES, II, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission reasonably determined that employees of a railroad's motor carrier subsidiary were not entitled to labor protection benefits when they were laid off following a railroad merger.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 934 F.2d 1171. The initial decision of the Interstate Commerce Commission (Pet. App. 26a-53a) and its decision on reopening (Pet. App. 54a-78a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1991. A petition for rehearing was denied on August 20, 1991. Pet. App. 24a-25a. The petition for a writ of certiorari was filed on January 8,

1992.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATMENT

1. In 1982, the ICC gave its approval under 49 U.S.C. 11343 to the consolidation of the United Pacific Railroad Company (UP), the Missouri Pacific Railroad (MP), and the Western Pacific Railroad (WP). *Union Pac.—Control—Missouri Pac.; Western Pac.*, 366 I.C.C. 462 (1982) [*Union Pac.—Control*], aff'd *sub nom. Southern Pac. Transp. Co.* v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, 469 U.S. 1208 (1985). In addition, the Commission approved UP's proposed acquisition of control of the motor carrier subsidiaries of MP and WP. The consolidated carrier continued to control the Union Pacific Motor Freight Company (UPMF), the motor carrier subsidiary of the UP. Pet. App. 2a-3a.

Under the Interstate Commerce Act, the Commission is required to provide a substantial level of protection to railroad employees who are affected by a rail carrier's involvement in a consolidation transaction requiring Commission approval. See 49 U.S.C. 11347. The protections provided by the ICC are known as the *New York Dock* conditions.[2] In the case of UP's consolidation with MP and WP, the

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[1] Petitioners filed their petition on November 15, 1991, but their appendix was rejected by the Clerk of this Court. The appendix was refiled on January 8, 1992, and the petition was docketed on that date.

[2] See *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (describing the ICC's protective conditions), aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979); Pet. App. 91a-127a (setting forth the *New York Dock* conditions).

Commission imposed *New York Dock* conditions for the benefit of the railroad employees affected by the consolidation. *Union Pac.—Control*, 366 I.C.C. at 618-622.

2. a. More than three years after the Commission approved the UP/MP/WP consolidation, several motor carrier employees of the UPMF who had been furloughed wrote to the Commission claiming they were entitled to benefits under the *New York Dock* conditions.[3] The Commission reopened the *Union Pacific—Control* proceeding to clarify whether the motor carrier employees of UPMF were entitled to labor protection. It concluded that none of the former motor carrier employees were entitled to *New York Dock* benefits. Pet. App. 26a-53a. The Commission explained that under Section 11347 nonrailroad employees, such as the motor carrier employees in this case, are not entitled to such benefits. *Id.* at 59a-63a. The Commission relied on the language of Section 5(2)(f) of the Interstate Commerce Act (49 U.S.C. (1976)) (the predecessor of Section 11347),[4] which restricted mandatory labor protection to "railroad employees," and long-standing administrative and judi-

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[3] In addition to the petitioners in this proceeding, several other furloughed employees of UPMF claimed *New York Dock* labor protection benefits. Those employees settled with UPMF and withdrew their challenge to the ICC's order. Pet. App. 5a & n.2; see Pet. 11-14.

[4] In 1978, Congress recodified the Interstate Commerce Act. See Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, codified at scattered sections of 49 U.S.C. 10101 *et seq.* The recodification "restate[s], without substantive change, laws enacted before May 16, 1978 * * *. Those sections may not be construed as making a substantive change in the laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. 1466. Cf. *Norfolk & Western R.R.* v. *American Train Dispatchers*, 111 S. Ct. 1156, 1164 n.4 (1991).

cial precedent.[5] The Commission rejected the contention that *Cosby* v. *ICC*, 741 F.2d 1077 (8th Cir. 1984), cert. denied, 471 U.S. 1110 (1985), required protection for petitioners. Pet. App. 41a-51a.

b. UPMF sought reopening of the Commission's decision. By order served August 17, 1989, the Commission reopened the proceeding to permit the filing of further evidence on the issue of whether the employees were entitled to mandatory *New York Dock* labor protection conditions. The Commission also invited the employees to attempt to demonstrate that labor protection conditions should be imposed for their benefit as a matter of administrative discretion under 49 U.S.C. 11344(c).[6] Pet. App. 22a, 56a-57a.

On reopening, the Commission again determined that none of the UPMF employees were entitled to mandatory labor protection under the *New York Dock* conditions. The Commission reaffirmed that only railroad employees are entitled to such mandatory protection. Pet. App. 54a-78a. In determining which employees are railroad employees, the ICC indicated that it would adhere to a test that looks to the identity of the employer. *Id.* at 41a-43a. Under that test, petitioners, who were employed by motor carrier subsidiaries, are not railroad employees and do not receive mandatory labor protection. *Id.* at 42a. The ICC also found petitioners had submitted no evidence that would justify exercise of the

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[5] See *Pennsylvania R.R.—Merger—N.Y. Central R.R.*, 347 I.C.C. 536 (1974); *American Buslines, Inc.* v. *United States*, 253 F. Supp. 481 (D.D.C.), aff'd mem. *sub nom. Amalgamated Transit Union* v. *United States*, 385 U.S. 38 (1966).

[6] 49 U.S.C. 11344(c) states that the Commission "may impose conditions governing" a merger or consolidation transaction approved under that Section.

agency's discretion to impose labor protection conditions under 49 U.S.C. 11344(c). Pet. App. 38a, 43a.

3. Petitioners sought review of the ICC's decision in the court of appeals. The court denied the petition, holding that the Commission's conclusion that motor carrier employees are not entitled to mandatory protection under Section 11347 was a permissible one, and that petitioners had not properly presented to the ICC the issue of whether the agency should have afforded discretionary labor protection in this case. Pet. App. 1a-23a.

In reviewing the ICC's construction of Section 11347, the court of appeals applied the analysis set forth by this Court in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court said that Section 11347 does "not unambiguously express[] an intent that employees of a motor carrier subsidiary are entitled to the mandatory protections afforded in § 11347," nor does it unambiguously provide that they are not entitled to such mandatory protection. Pet. App. 9a-12a. Accordingly, the court asked whether the agency's decision to restrict mandatory labor protection under Section 11347 to employees who work for a railroad is a "permissible" one. Pet. App. 13a-14a, citing *Chevron*, 467 U.S. at 843, and *Chemical Mfrs. Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985). The court then found that the ICC's interpretation was "a permissible and rational construction of the statute." Pet. App. 15a.

The court of appeals stated that the ICC had reasonably taken into account the fact that the language of the precodification version of Section 11347 referred only to "railroad employees." Pet. App. 16a; see note 4, *supra*. The court also observed that the ICC's approach is supported by the fact that it "provides certainty and a logical limit to the scope of the

employees protected by § 11347." Pet. App. 16a. "[A] reading as expansive as that petitioners request," the court noted, "would render superfluous the ICC's use of discretionary authority * * * to give labor protection for *other* employees affected by a consolidation." *Id.* at 16a-17a.[7]

The court noted that the Eighth Circuit in *Cosby* v. *ICC*, *supra*, had found that certain motor carrier employees were entitled to labor protection in a consolidation. The court found *Cosby* unpersuasive, however, because that decision adopted an interpretation of the statute without considering whether deference to the ICC was warranted under *Chevron*. Pet. App. 13a.[8]

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[7] The court of appeals also rejected petitioners' claim that the ICC's interpretation of Section 11347 is inconsistent with the agency's "single system doctrine." Pet. App. 17a n.4. Under that doctrine, the Commission has found that the acquisition of "a single, integrated transportation system * * * made up of several separate corporations" (including motor carriers) is the acquisition of "one carrier," *Brotherhood of Ry. & Airline Clerks* v. *Burlington Northern, Inc.*, 671 F.2d 1085, 1089 (8th Cir. 1982), for purposes of determining whether the transaction is subject to the requirement of ICC approval under Section 11343(a)(4). That provision governs "acquisition of control of at least 2 carriers by a person that is not a carrier." 49 U.S.C. 11343(a)(4). The court of appeals noted that the ICC has never applied the single system doctrine to hold that employees of motor carrier subsidiaries of railroads are entitled to labor protection under Section 11347. Pet. App. 17a n.4.

[8] The court of appeals also noted that in *Kansas City Southern Indus., Inc.* v. *ICC*, 902 F.2d 423, 435 (5th Cir. 1990), the court had agreed with the ICC that certain motor carrier employees were not entitled to mandatory labor protection under Section 11347. The court pointed out that the motor carrier in *Kansas City Southern* "was not restricted to auxiliary-to-rail services and received a majority of its revenues from nonrail-related activities." Pet. App. 12a-13a.

Finally, the court of appeals found that the ICC reasonably denied discretionary labor protection to petitioners in light of the fact that "petitioners failed to present any supporting arguments at the reopening proceeding, despite being invited to do so." Pet. App. 20a. The court concluded that petitioners "had the burden to present their case to the ICC for consideration and their failure to properly present the issue of discretionary protection to the ICC precludes our review." *Id.* at 23a.

ARGUMENT

1. Petitioners contend (Pet. 32-36) that the court of appeals erred in deferring to the ICC's view that 49 U.S.C. 11347 does not provide mandatory labor protection to employees of motor carriers. That contention does not warrant this Court's review.

Section 11347 provides that when the Commission approves a consolidation transaction under Section 11343 involving a "rail carrier," it shall "require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transactions as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565)." 49 U.S.C. 11347. Prior to the 1978 recodification of the Interstate Commerce Act, the predecessor to Section 11347 used the term "railroad employees" to define the class of persons entitled to mandatory labor protection. No substantive change in meaning can be attributed to the recodification. *Train Dispatchers*, 111 S. Ct. at 1164 n.4. It follows that Section 11347 reflects a congressional intention to protect only "railroad employees," *i.e.*, those directly employed by a railroad. There is no merit in petitioners' claim (Pet. 36) that the stat-

ute unambiguously includes all employees who perform "rail work," regardless of the identity of their employer. The statute simply does not say that labor protection applies to persons engaged in work that might be thought to be characteristic of railroad employees, and it provides no guidance for applying such a nebulous standard.

If there is any ambiguity in determining which employees are covered by Section 11347, the court of appeals was correct in holding that the ICC's long-standing view, see *Pennsylvania R.R.—Merger—N.Y. Central R.R.*, 347 I.C.C. 536 (1974), that mandatory labor protection is afforded only employees of rail carriers, is a permissible one. Pet. App. 10a. As the ICC explained, the agency's bright-line test relieves the Commission (and those it regulates) of the burden of having "to examine each job performed in a non-rail subsidiary to determine whether it is the type of work that strikes us as being railroad work." *Id.* at 65a; see *id.* at 62a-63a (noting the difficulty of determining the "appropriate boundaries of 'railroad' work" that might entitle non-rail employees to mandatory labor protection and questioning "whether Congress intended such a flexible interpretation of the statute, particularly when it has supplied no guidelines for this task"). The ICC's approach also preserves room for the imposition of labor protection conditions for the benefit of non-rail employees as a matter of discretion, pursuant to 49 U.S.C. 11344(c).

In sustaining the ICC's interpretation, the court of appeals explained that the Commission's "identity of the employer" test, which limits coverage to those directly employed by railroads, "provides certainty and a logical limit to the scope of employees protected by § 11347" and avoids rendering "superfluous" the discretionary use of Section 11344. Pet. App. 16a.

In light of the reasonableness of the ICC's position, and the consistency of its approach with express statutory provisions, *Chevron* requires a court to defer to the ICC's interpretation of its governing statute. See *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988).[9]

2. Petitioners also contend (Pet. 18-21, 29-32) that review is warranted in order to resolve a conflict between the holding in this case and the holding in *Cosby* v. *ICC*, 741 F.2d 1077 (8th Cir. 1984), cert. denied, 471 U.S. 1110 (1985). This case does not present a conflict warranting resolution by this Court. The Tenth and Fifth Circuits[10] have found

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[9] Contrary to petitioners' contention (Pet. 24-26), the court of appeals correctly found that the "single system doctrine," used by the ICC to determine that certain acquisition transactions are not covered by 49 U.S.C. 11343, has no relevance in determining whether motor carrier employees are entitled to labor protection under 49 U.S.C. 11347. Pet. App. 17a n.4. The Commission views certain corporate affiliates as a single entity for the purpose of determining that a transaction does not require ICC approval at all; that logic does not mean that when a transaction *does* require ICC approval, all employees of all corporate affiliates must be treated identically for purposes of providing labor protection. The Commission has never applied the single system doctrine to require labor protection for employees of motor carrier subsidiaries of railroads.

[10] See Pet. App. 1a-23a; *Kansas City Southern Indus., Inc.* v. *ICC*, 902 F.2d 423, 435-438 (5th Cir. 1990). Petitioners attempt to distinguish the *Kansas City Southern* decision factually (Pet. 27-28), but ignore the Fifth Circuit's direct holding there that the ICC's interpretation of Section 11347—the same interpretation confirmed by the Tenth Circuit in this case—should be sustained. 902 F.2d at 438.

that the ICC's interpretation is permissible.[11] While the Eighth Circuit's decision in *Cosby* took a different approach, that decision does not squarely conflict with this one, and the aberrant holding in *Cosby* does not impede the ICC's enforcement of the Act.

In *Cosby*, the court of appeals gave two alternative grounds for requiring the ICC to afford labor protection under Section 11347 to employees of a motor carrier subsidiary of a railroad involved in a consolidation. First, the court rejected the Commission's test of applying mandatory protection only to employees of railroad carriers, and instead held that certain motor carrier subsidiary employees should "be considered railroad employees" because their work was "intimately tied to the railroad's main transportation function." 741 F.2d at 1080-1081. Alternatively, the court assumed that the ICC had discretion to grant or deny labor protection conditions to motor carrier employees; the court then found an abuse of discretion by focusing on specific record evidence of job security assurances given to the motor carrier employees in that proceeding. *Id.* at 1081-1084.

Even if *Cosby* were applied here, it would not aid petitioners. Under the first of *Cosby*'s rationales, petitioners would not qualify for labor protection, because, as the ICC stated, they "have not demonstrated that the motor carriage performed by UPMF was limited to transportation that is auxiliary to rail

[11] The same result obtained in an early proceeding that challenged the ICC's policy. See *American Buslines, Inc.* v. *United States*, 253 F. Supp. 481, 483 (D.D.C.) ("While Section 5(2)(f) of the Act requires certain minimum financial protection over a period of four years to railroad employees, no such requirement has ever been enacted by the Congress for motor carrier employees."), aff'd mem. *sub nom. Amalgamated Transit Union* v. *United States*, 385 U.S. 38 (1966).

movements and so intimately connected to UP's main transportation system so as to transform [petitioners] into 'railroad employees,' as described in dicta in *Cosby*, 741 F.2d at 1080-81." Pet. App. 41a; see also *id.* at 64a n.5 (restating the same conclusion after reopening the proceeding). Nor are petitioners aided by the alternative rationale in *Cosby*, which, as the court itself explained, turned on unique "facts and circumstances" relating to representations by the carrier. *Cosby*, 741 F.2d at 1081. When carriers have made such representations, the Commission has extended *New York Dock* labor protection to employees. *Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Ry.*, ICC Docket No. 28583 (Sub-No. 26) (Apr. 19, 1991) (1991 ICC LEXIS 88). Petitioners, however, make no claim that UP made representations that motor carrier employees would receive the benefits of mandatory labor protection.[12] See Pet. App. 45a-51a.

Quite apart from petitioners' failure to raise a square conflict with *Cosby*, the issue presented in this case is not of sufficient practical importance to warrant this Court's attention. Although petitioners correctly note (Pet. 22-24) that the ICC has in the past issued licenses for the operation of motor carriers to railroads or to rail affiliated motor carriers

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[12] Petitioners claim (Pet. 36-46) that the court of appeals erred in holding that they were precluded from challenging the ICC's denial of discretionary labor protection; the court of appeals found such preclusion because petitioners presented no evidence on that issue. That factbound claim does not merit review by this Court. In any event, the court of appeals correctly held that all of the evidence presented by petitioners went to applicability of Section 11347, and that "[n]o separate evidence or argument was directed at the availability of discretionary protection." Pet. App. 22a-23a.

that were restricted to service that was "auxiliary to or supplemental" to the railroad, see *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951), the Commission no longer issues such restricted licenses. Any such restrictions in a railroad or rail affiliate's motor carrier operating authority can be removed from a motor carrier's operating license on application. *Applications for Motor Carrier Operating Authority by Railroads & Rail Affiliates*, 132 M.C.C. 978 (1982), aff'd *sub nom. American Trucking Ass'ns* v. *ICC*, 722 F.2d 1243 (5th Cir.), cert. denied, 469 U.S. 930 (1984). Thus, the first alternative holding of *Cosby* is of limited continuing significance.

Moreover, the Commission's administration of Section 11347 has not been impeded by the *Cosby* holding. The issue in this case arises very rarely. Petitioners point to no decision in the years since *Cosby* that would have come out differently if the ICC had applied the *Cosby* test rather than the agency's test. In light of *Cosby*'s narrow precedential significance and the fact that other courts are in agreement with the Commission's interpretation of Section 11347, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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